BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHELLE D. WILLIAMS	)	
Claimant	)	
	)	
VS.	)	
	)	
ALLIED STAFFING	)	
Respondent	)	Docket No. 1,058,426
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 5, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's injury arose out of and in the course of her employment with respondent. Respondent was ordered to pay as authorized claimant's medical expense bills as set out in Exhibit 3 to the Preliminary Hearing Transcript as well as reimburse claimant the amount of $462 in unauthorized medical expenses. Respondent was ordered to designate to the claimant an authorized orthopedic specialist to evaluate and, if necessary, treat claimant's injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 4, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent denies that claimant's accidental injury arose out of and in the course of employment as it was the result of an activity of day-to-day living and was the product of a neutral risk. Respondent asks that the Board reverse the ALJ's Order of January 5, 2012.

Claimant asserts the ALJ correctly determined that her accidental injury arose out of and in the course of her employment. Accordingly, claimant asks the Board to affirm the ALJ's Order of January 5, 2012.

The issue for the Board's review is: Did claimant's accidental injury arise out of and in the course of her employment?

FINDINGS OF FACT

At the time of claimant's injury, she was working at Heritage Labs, where she had been placed by respondent, a temporary placement service, in August 2011. Claimant was allowed a 30 minute lunch break, during which time she was off the clock. Smoking was not allowed in the building at Heritage Labs, but a fenced area on the side of the building was designated as an employee smoking area. In order to reach the smoking area, employees had to exit the building through a specific door using a key card, go down a set of stairs, cross a driveway and pass through a grassy area.

On October 26, 2011, claimant left the building during her lunch break to smoke a cigarette. She had no business documents with her and was not engaged in her job as a data entry clerk at the time. Claimant said once out of the building, she went down the stairs, crossed the driveway, and stepped over a curb that is between the pavement and the grassy area. Claimant said there was a trench alongside the curb that separated the pavement and the grassy area. On the day of her accident, the trench was filled with leaves, and claimant thought she was stepping out onto the grassy area. However, instead she stepped into the trench, fell to the ground and twisted her left ankle. Claimant testified she heard a pop, and her ankle swelled, and she felt pain. Claimant was taken to a hospital emergency room by ambulance, where x-rays were taken and she was given an air cast, crutches and pain medication. Other than treatment at the emergency room, she has not had any treatment for her left ankle. She still has swelling and pain, and also has a limp.

PRINCIPLES OF LAW

L. 2011, ch. 55, sec. 1 states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, ch. 55, sec. 5 [K.S.A. 44-508(h)] states in part:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

L. 2011, ch. 55, sec. 5 [K.S.A. 44-508(f)(3)] further states in part:

> (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
>
> (B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. . . .

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[1] Breaks benefit both the employer and employee.[2] In circumstances where the employee is taking a break in an area designated or permitted

---

[1] *See* Larson's Workers' Compensation Law § 13.05(4) (2006); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

[2] *Id.; Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998): and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,244, 1997 WL 377961 (Kan. WCAB June 9, 1997).

by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable.[3]

Larson's Workers' Compensation Law, Ch. 21 (2006) states:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

This general rule clearly recognizes that ministering to personal comfort is conduct that is typically considered an incident of employment. Activities which are an incident of employment are considered to arise "out of" the employment.

In *Hilyard*,[4] the Kansas Supreme Court stated:

> The words 'causal connection' certainly do not mean that the accident must have resulted directly and immediately from performance of the work for which the workman was employed. Such a narrowed interpretation would mean that whenever a workman was not directly engaged in the actual work to be done he would be without protection under the law.

In *Bright*,[5] the Kansas Supreme Court held: "A worker may be the employee of two employers, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other."

In *Scott*,[6] the Kansas Supreme Court held: "The term 'special employee' refers to a lent employee. A special employee becomes the servant of the special employer and assumes the same position as a regular employee for purposes of the Workers Compensation Act."

---

[3] See Larson's Workers' Compensation Law § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).

[4] *Hilyard v. Lohmann-Johnson Drilling Co.*, 168 Kan. 177, 182, 211 P.2d 89 (1949); see also *Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 267, 160 P.2d 701 (1945); *Thomas v. Proctor & Gamble Mfg. Co.*, 104 Kan. 432, 179 Pac. 372 (1919).

[5] *Bright v. Cargill, Inc.*, 251 Kan. 387, Syl. ¶ 7, 837 P.2d 348 (1992).

[6] *Scott v. Altmar, Inc.*, 272 Kan. 1280, Syl. ¶ 4, 38 P.3d 673 (2002).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

At the time of her accidental injury, claimant was employed by a temporary staffing agency. She had been placed by that staffing agency at Heritage Labs. Heritage Labs stood in the shoes of claimant's employer such that the premises of Heritage Labs constituted the premises of claimant's employer for the purposes of L. 2011, ch. 55, sec. 5 (K.S.A. 44-508[f][3]). Claimant was on the premises of her employer when she stepped in a hole and was injured. In addition, by designating the smoking area, claimant was also exposed to a special risk or hazard to which the general public was not exposed. Allowing a hole to be concealed by leaves in an area where workers were directed to walk could constitute a defect in the condition of the premises and employer negligence.

Stepping into a concealed hole and falling to the ground is neither an activity of day-to-day living nor a neutral risk. Claimant was not injured simply by walking, and her fall was not unexplained. She fell and was injured because she stepped into a concealed hole. Furthermore, claimant's accident and resulting injury that occurred during her authorized break arose out of and in the course of her employment under the Personal Comfort Doctrine, which is recognized in Kansas.

CONCLUSION

Claimant met with personal injury by accident arising out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 5, 2012, is affirmed.

IT IS SO ORDERED.

---

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of March, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Zachary A. Kolich, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge